Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. .....

~~77~~-1288

JOHN PHILIP QUAGLINO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Three.

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vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Three.

JOHN PHILIP QUAGLINO, petitioner, prays that a writ of certiorari issue to review the judgment and decision of the COURT OF APPEAL OF THE STATE OF CALIFORNIA, Second Appellate District, Division Three, filed in this matter on September 30, 1977 which became final on October 31, 1977, and which the CALIFORNIA SUPREME COURT refused to grant hearing upon on December 15, 1977.

Opinion Below.

The unreported opinion of the COURT OF APPEAL OF THE STATE OF CALIFORNIA, Second Appellate District, Division Three, is attached hereto in the appendix to this petition.

Jurisdiction.

The opinion attached in the appendix hereto, which is sought to be reviewed was filed by the COURT OF APPEAL OF THE STATE OF CALIFORNIA for the Second Appellate District, Division Three, on September 30, 1977 and became final as to said Court on October 30, 1977.

A rehearing by the COURT OF APPEAL OF THE STATE OF CALIFORNIA, Second Appellate District on October 18, 1977 and a subsequent motion to vacate decision and to grant a hearing filed by new counsel was denied on October 28, 1977. On November 9, 1977 simultaneous petitions for hearing and for Writ of Habeas Corpus were filed with the California Supreme Court and denied on December 15, 1977 (the Petition for Hearing being denied by a four to three vote of the California Supreme Court).

The jurisdiction of this Court is invoked under the provisions of Section 1257(3) of Title 28 of The United States Code.

Questions Presented.

1. Does the hypnotizing of a key prosecution identification witness by the prosecution violate an accused defendant's Right to Due Process of Law under the Fifth and Fourteenth Amendments to the Constitution of the United States of America?

2. Can a State court allow the introduction of scientifically questionable testimony under any state sanctioned procedure without abridging the privileges and immunities of an accused under the Fourteenth Amendment to the Constitution of the United States of America?

3. Is a defendant in a criminal proceeding deprived of equal protection of the law under the Constitution of the United States where the mental impressions of a key identification witness are tampered with by the prosecution?

4. Is an accused's state granted right to appeal unconstitutionally inhibited where an issue of trial counsel's competency is raised and the accused is not placed on notice of the potential conflict by either trial counsel who is acting as appellate counsel or the court?

5. Where trial counsel fails to properly raise an appropriate objection to improperly admitted evidence which is clearly prejudicial, is the accused deprived of his Sixth Amendment right to effective assistance of counsel?

6. Can a conviction based on the hypnotically-induced testimony of an uncorroborated witness be upheld?

Constitutional Provisions Involved.

1. The Fifth Amendment to the Constitution of the United States of America provides in part that:

> No person shall be deprived of life, liberty or property, without due process of law; . . .

2. The Sixth Amendment to the Constitution of the United States of America provides in part that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . and to have the assistance of counsel for his defense.

3. Section 1 of the Fourteenth Amendment to the Constitution of the United States of America provides in part that:

> . . . No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case.[1]

On October 17, 1975, the District Attorney for the County of Santa Barbara filed an information with the Superior Court charging petitioner with violation of Penal Code Section 187 (murder) (CT 3). The first jury trial on this charge commenced on January 20, 1976 (CT 13). In connection with this trial, the Court ruled on several motions, including a motion to suppress identification and hypnotic intervention on a witness, Myron Jensen, the sole person to identify the defendant as a probable owner of the death car. The Court admitted the testimony (CT 18-19). The Court also denied petitioner's motion for change of venue and exclusion of testimony of witnesses concerning other conduct of petitioner, primarily directed toward the victim (CT 33). Much of this testimony was admitted. The jury divided eight (8) to four (4) for conviction and a mistrial was declared on March 10, 1976 (CT 48, stipulation filed May 14, 1976).

[1]For the Court's convenience, the following abbreviations are used throughout: RT refers to the Reporter's Transcript in the Court of Appeal from the third trial; RT1 refers to the Reporter's Transcript in the Superior Court from the first trial; RTA and RTB refer to supplemental transcripts which are part of the record in the Court of Appeal and include the evidentiary hearing on the defense motion to exclude identification evidence; Am.B. refers to Amicus Brief of the California Attorneys for Criminal Justice (CA/CJ) filed in the California Supreme Court; App.Am.B. refers to the Application of CACJ for permission to file Amicus Brief before the California Supreme Court.

The second jury trial commenced on April 1, 1976 (CT 51). All motions, oral and written, granted during the first trial were incorporated by reference in the retrial, upon stipulation of counsel (CT 79). The jury was again unable to reach a verdict and a second mistrial was declared, with seven (7) jurors voting for conviction, four (4) for acquittal and one (1) undecided (CT 70, stipulation, *id.*). Petitioner then moved for dismissal, but his motion was denied (CT 81).

The third jury trial began on July 27, 1976 (CT 83). Petitioner's motions, oral and written, made in connection with the first trial, were again incorporated by reference and the Court reiterated its rulings (RT 266-269). On September 2, 1976, the jury returned a verdict of guilty of first degree murder (CT 189). Judgment of conviction was entered on September 17, 1976, and petitioner was sentenced to life imprisonment as prescribed by law (CT 196, 191). Notice of appeal was filed the same day, after a motion for a new trial was denied.

Petitioner was represented through the three (3) trials, appeal to the Court of Appeal for the State of California, Second Appellate District, Division Three (hereinafter referred to as "Court of Appeal"), and motion for rehearing by James Westwick, Esquire, of Santa Barbara, California. Petitioner's opening brief was filed on March 4, 1977, consisting of thirty-one

(31) pages. Respondent's brief, one hundred twenty-three (123) pages long, was filed on May 29, 1977. Petitioner's reply brief, ten (10) pages long, was filed on August 18, 1977. A request to augment the record was filed on March 18, 1977 and partially granted on March 25, 1977. The appeal was argued on September 21, 1977, and the opinion of the Court of Appeal was filed nine (9) days later, on September 30, 1977. The decision was certified for nonpublication.

Petition for rehearing was filed with the Court of Appeal on October 11, 1977 and denied on October 18, 1977.

On October 20, 1977, new counsel was retained by Petitioner. Substitution of attorneys was executed on October 26, 1977 and was filed in the Court of Appeal, together with a motion to vacate decision and to grant a rehearing, on October 28, 1977, three (3) days before the decision of the Appellate Court became final. The motion was denied without opinion on the same day.

A petition for hearing from the appeal, the denial of the motion to vacate decision and from the judgment of conviction was thereafter filed with the California Supreme Court on November 9, 1977.

Thereafter on December 15, 1977, the California Supreme Court, having granted the California Attorneys for Criminal Justice the right to file an amicus brief which augmented the record with substantial scientific evidence attacking the reliability of hypnotically induced evidence denied a hearing with three Justices voting for a hearing.

Statement of the Facts.[2]

At approximately 6:30 a.m. on the morning of September 10, 1975, Dyanne Quaglino, the estranged wife of petitioner[3] was struck by a car and killed as she was jogging in a street, several feet from the curb. The car did not stop and there were no automobile skid marks in the area where the body was found. Based on statements of witnesses who had either seen Dyanne jogging or the car drive up the street (but none of whom saw the accident), the police located the car, a 1959 green and white Ford, that same evening behind the apartment complex where petitioner lived.

In May 1975, Myron Jensen sold the car for a friend to a person who identified himself as Richard W. Bellmore. The sale took place at Jensen's house. The purchaser drove away in a 1970 brown Chevrolet station wagon[4]. The purchaser returned to Jensen's place of employment to complain that the battery did not work; Jensen replaced the battery and gave him a smog certificate. There were two meetings between the purchaser and Jensen that day, and Jensen gave the purchaser a ride in his car on one occasion.

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[2]There appear to be no significant issues relating to the circumstances leading up to the death of petitioner's estranged wife, other than the identity of the driver of the death vehicle; therefore, factual recitation contained in the opinion of the Court of Appeal is relied upon and no direct references are made to the Reporter's Transcript itself.

[3]Dyanne had filed for divorce some five months before her death.

[4]The defense introduced evidence that petitioner neither owned nor had a car matching this description, or the description of the Ford.

On September 11, 1975, the Santa Barbara Sheriff's Department contacted Jensen and asked him to describe the purchaser of the car. The deputies showed him a 12-year old picture of petitioner and inquired whether the man in the picture looked familiar. Jensen said that the picture "struck a bell," but could not identify petitioner as the purchaser. The following weekend the deputies showed Jensen seven pictures of bearded men, none of whom he could identify as the purchaser.[5]

Jensen was contacted the following week by the deputies about undergoing hypnosis to improve his memory of the person who purchased the car. Jensen agreed and a Dr. Gott hypnotized him. Additional facts concerning the hypnotic procedure are stated elsewhere in the petition.

After Jensen came out of hypnosis, he was given seven photographs, including petitioner's picture which bore a similarity to the 12-year old picture previously shown to Jensen by the deputies. Jensen identified the petitioner as the person to whom he did or might have sold the car. Jensen then requested confirmation of his "identification" by way of a lineup where he again identified the petitioner. Jensen again "identified" petitioner in each of the three trials and in the preliminary hearing preceding them.

A fingerprint expert retained by the prosecution testified that numerous prints were removed from the car, and he formed an opinion that one "overlay" print was petitioner's. Two defense fingerprint experts and the deputy who first removed the prints testified that, although there were some similarities between the prints, they could not identify any fingerprint as petitioner's.

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[5]These pictures included a picture of Richard W. Bellmore, an out-of-state resident who was then a suspect in the case. Petitioner's (who is clean shaven) picture was not included.

The prosecution further introduced evidence that Dyanne and Petitioner were separated, were involved in divorce proceedings, and had had disagreements over child custody and property settlement. Several witnesses testified that, on several occasions, petitioner has threatened to hurt Dyanne. One witness testified that petitioner was going to get the children back one way or another, although petitioner's version was that he intended continuing efforts in the courts.

Petitioner testified in his own behalf. He denied that he had killed his wife. He stated that he was in bed with his girl friend on the morning of Dyanne's death. He stated that he had never purchased nor seen the 1959 Ford which caused Dyanne's death, and produced several witnesses to attest to the fact that no one ever saw him in or near such a car or the brown Chevrolet station wagon which was driven by the person who purchased the vehicle. He testified that he went jogging around 6:00 a.m. on the morning of Dyanne's death and returned approximately 20 minutes later. Petitioner's girl friend's testimony was read into evidence by the prosecution and the defense introduced her picture. She testified that petitioner was not breathing heavily when he returned from jogging that morning. When first questioned by law enforcement officers, however, she stated that the petitioner had not left the apartment at all. Petitioner was called by the Sheriff's office and told that Dyanne was killed in a hit and run accident.

Factual Background of Jensen's Identification.[6]

The car which struck Dyanne Quaglino, resulting in her death, was a 1959 Ford which, according to prosecution testimony, was traced to one Russell Atkins. Atkins had sold the car through a used car salesman, Myron Jensen (RT 224-225) to a man identified by Jensen, and Jensen alone, while subject to hypnotism as the petitioner herein. Consequently, Jensen's purported hypnotically-induced identification was critical to the prosecution's case in view of the disagreement of the witnesses on the question of fingerprints.

Jensen testified that he put the car up for sale, and an individual came to purchase it on a Friday evening, in May 1975, as it was "getting dusky." (RT 227:18, 225:22). The total transaction took fifteen to twenty minutes (RT 230:27). The purchaser returned with the car early the following Tuesday morning and reported that the battery was dead (RT 234:8-16). Jensen drove across town with the purchaser and arranged to replace the battery. The transaction on Tuesday morning took approximately fifteen minutes. Jensen replaced the battery, and the purchaser returned in the afternoon to pick up the car (RT 236-237). They spent at most five minutes on the third occasion (RT 238:22-23) and Jensen did not see the man again.

Some months later the police suspected involvement of the car in the death of Dyanne Quaglino. Two individuals were considered by Detective Baker, the

[6]Petitioner has, for the sake of convenience, adopted portions of the Court of Appeal Factual Recitation, petitioner did object to certain key portions of the opinion by way of petition for hearing. The People have, however, voiced or presented no objections to the factual recitations and are, therefore, bound by them.

primary investigating officer (RTB 40:24), to be suspects (RTB 42:25-43:10)—the petitioner, and one Richard Bellmore, whose name appeared on the documents transferring ownership of the car. A briefing session was held on September 11, 1975, at which time Detective Roger Best was assigned the responsibility of interviewing Jensen (RTB 3:24-4:4).

Detective Baker gave Detective Best a single photograph which he was told was a 12-year old picture of the petitioner (RTB 4-6)[7]. Detective Best testified that there were "any number of other photographs available" to him in the Sheriff's office, that it would have taken "very little time" to obtain photographs similar to that of the petitioner and that doing so would have involved a "relatively simple procedure." Best failed to do so only because he didn't think of it (RTB 26:1-17).

In the course of interviewing Jensen, Detective Best showed the Quaglino photograph to Jensen. Jensen was aware that he was being asked about the identity of the person who bought the car (RTB 30:9-31:6) and was told by Best, "Keep in mind that this picture may not be the present age. It may be old. It may be, you know, different." (RTB 102:1-2). Jensen said that the photo "sort of rings a bell" but that he couldn't remember the purchaser of the car well enough to identify him. He asked to look at the picture again but stated again that he couldn't identify the person in the photograph as the purchaser of the car (RTB 31-32). Jensen testified on a suppression motion as follows concerning the picture:

[7]Please refer to note 5, *supra*, the accompanying text. The picture was of a man without a beard.

A. I looked at it real close, and I said, "It does strike a bell, but I really can't tell you where, but it just strikes a bell to me."

Q. Could you connect that person with the sale of the automobile that Detective Best was asking you about?

A. I didn't—I mean, I couldn't then identify that as the man that bought the automobile, no. (RTB 102:9-15).

Because Jensen was unable to identify the purchaser of the car, the police decided to enhance his recall through the device of hypnosis and Deputy Gary Selk, a personal friend and former co-worker of Mr. Jensen (RTB 48:19-21, RTB 109:6-8, RT 248:16-19), was assigned the responsibility of persuading him to submit to a hypnosis session under Dr. Frank Storey Gott.

In the interim, Jensen was contacted by Baker and another officer and asked to look at a series of photographs of bearded men, one of whom was Bellmore; he didn't recognize any of these photos (RTB 107-108).

Detective Selk explained that the reason for hypnosis was that the police "were having an awful time tracing down who bought this car," and that the purpose of submitting to hypnosis was to improve his recall (RTB 109:11-12, 110:1-4). Jensen agreed to his friend's suggestion and appointments with Gott were arranged. Jensen was interviewed by Gott on Thursday, September 18, 1975 to see whether he was a fit subject for hypnosis (RT 325-326, RTB 126:17-28), and had a second appointment the following day to undergo hypnosis. At the first interview, Gott told Jensen that

hypnosis was used to improve recall for identification (RTB 127:14-20).

He once again met Detective Baker at the Jensen hypnotism session (RTB 126:4-16) and Baker was present throughout, slipping suggestions to Dr. Gott of questions to ask Jensen under hypnosis (RT 329:19-21, RTA 17:4-7, 18:24-27, 11:8-10).

Jensen was asked under hypnosis to recreate the sale of the car in his mind and to describe the purchaser. His description was essentially the same as he had given Officer Best (RTB 123:11-23). Dr. Gott told Jensen just before bringing him out of the trance:

> That he would remember the experience and the description of the man's features, and the stature and that he would remember it after the hypnotic session, so that he would be then better able to use it for identification. (RTA 12:20-25).[8]

Immediately after being brought out of the trance, Jensen was shown by Detective Baker a stack of photographs of men without beards, one of whom was the petitioner. Jensen picked out petitioner's photo as that of the purchaser of the car in words which Jensen remembered as, "That looks like the man that bought the car." (RTB 112:13, RT 255:20). Jensen attributed his asserted ability to identify the person to whom he sold the car to hypnosis (RTB 125:8-21, RT 257:21-24, RT 304:10-18). Thus, Jensen himself admitted that his identification of petitioner was "the product of the hypnosis." (RT 304:16-17).

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[8]Exactly what Dr. Gott told Jensen, and in what manner, was not part of the tape, so it was impossible for defense experts to validate the procedure. See page 16, *infra*.

REASON FOR GRANTING THE WRIT.

The present case presents this Court with a major issue concerning the integrity of our criminal justice system and the rights of an accused to be free from the tampering with the minds and thought processes of witnesses. The issues raised are nothing short of the issues of whether American Jurisprudence can survive the threat of "mind control and manipulation" at the hands of prosecutors, who when unable to piece together a conviction against a prime suspect resort to a technique which the weight of scientific evidence has held to be unreliable for retrieval of historically accurate facts and may in fact result in the distortion of such facts by implanting erroneous facts in the mind of a witness.

In the present action it is impossible to ascertain the prejudice to the petitioner caused by the manipulation and transgressions into the memory and thoughts of a key witness. It is enough to point out that, even with such manipulation and the failure of trial counsel to properly attack the damaging testimony, it took three trials to obtain a conviction at the hands of a highly skilled prosecutor with eight jurors having held fast for acquittal.

I.

There Is No Scientific Basis for the Acceptance of Hypnotically-Induced Testimony to Establish Facts in a Criminal Trial.

Dr. Martin T. Orne, Professor of Psychiatry at the University of Pennsylvania and current President of the International Society of Hypnosis, observed in his affidavit filed with the California Supreme Court in

support of the application of the California Attorneys for Criminal Justice to file an Amicus Curiae:

> In subsequent research we have repeatedly documented both processes occurring within the same age regression session: an apparent increase in recall *as well as an increased tendency to confabulate,*[9] *to make up suitable memories, using whatever information was previously available to the individual . . .*
>
> Because of these two tendencies which are facilitated by hypnosis, increased recall and increased confabulation, *it is extremely difficult to know which aspects of hypnotically aided recall are historically accurate and which aspects have been confabulated . . .* (Emphasis added).[10]

Hypnosis, by its very nature, is a process of suggestion. The classic works on the subject, by their titles indicate that suggestion and hypnosis are synonymous.[11] And as the prosecution's leading expert at the first trial herein said, "There is no hypnosis, there is only suggestion." (RT 110:11-12). It is not surprising, therefore, that the subject of hypnosis often comes to think, either voluntarily or through suggestion by the hypnotist, that false statements are true.

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[9]Confabulation is defined as the actions of a hypnotized subject to substitute appropriate details for facts which cannot, in fact, be recalled.

[10]App.Am.B.—App. p. 5.

[11]*E.g.*, Hill, *Hypnosis and Suggestibility, and Experimental Approach*, New York, Appleton-Century-Crofts, 1968, and Weitzenhoffer, *Hypnotism, an Objective Study in Suggestibility*, New York, Wiley, 1953. The prosecution witness studied Weitzenhoffer (RT 5).

Two glaring examples come to mind. In the first instance there is the case of a young girl who confessed under hypnosis to a murder she had nothing to do with.[12] Another example is a series of laboratory tests performed by Weinstein, Abrams and Gibbons in which false guilt was induced in experimental subjects through hypnosis and the subjects were so convinced of their guilt that they were unable to pass a lie detector test thereafter.[13]

The most famous case of a subject of hypnotism who imagined an event under hypnotism is that of "Bridey Murphy," a woman who supposedly was "age regressed" to a prior incarnation under hypnosis.[14] In fact, she had inserted into a memory bank facts which came from an entirely different part of her career. The case has led one leading authority on hypnosis to observe that the case:

> Shows that memories revived under hypnosis, no matter how convincing to the subject, cannot be trusted until verified by external criteria. The "will-to-believe" may be so strong in the hypnotist as well as in the subject as to give the impression of validity.[15]

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[12]See Margolin and Sinoway, "Hypnotically-induced False Confession to Murder: Preliminary Questions Regarding Consent, Admissibility in Evidence and Other Legal Issues," 3 California Attorneys for Criminal Justice *Forum* (1976), reprinted in Practising Law Institute *15th Annual Defending Criminal Cases*, 733 (1977), and ABA National Institute on Exclusionary Rules, program materials, March-April, 1977, Chapter 7, Section 3.

[13]Weinstein, Abrams and Gibbons, "Validity of the Polygraph with Hypnotically Induced Repression and Guilt," 126 Am.Jour. Psychiatry 143-146 (1970).

[14]Bernstein, *The Search for Bridey Murphy*, 1956.

[15]Hilgard, *Divided Consciousness: Multiple Controls in Human Thought and Action*, New York, Wiley, 1977, at p. 59.

There is extensive evidence in the literature that hypnosis may make subjects more confident in their recall without making them any more accurate. Hilgard,[16] for instance, has noted,

> Confidence by the subject in the accuracy of recovered memories does not guarantee their accuracy . . .

"Suggestion" is the name of the game in hypnosis, and it may lead without proper controls to deception of hypnotist and subject alike. The inherent unreliability of its results have been succinctly summarized as follows:

> The hypnotized subject's impulsion to produce expected responses, which even incorporates his own subjective conviction, may also be described as the subject's impulsion to validate what he believes the hypnotist expects. *Moreover, this tendency to validate the shared expectations is quite independent of the contents of these beliefs* . . .[17] (Emphasis added).

While there is a certain amount of folk wisdom to the effect that hypnosis improves recall, researchers have had little success establishing the truth of that

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[16]Ernest Hilgard, a prominent Stanford University psychologist, is the author of four books related to hypnosis: *Hypnotic Susceptibility*, New York: Harcourt Brace Javanovich, 1965. *The Experience of Hypnosis: A Shorter Version of Hypnotic Susceptibility*. New York: Harcourt Brace Javanovich, 1968. *Hypnosis in the Relief of Pain* (with Josephine R. Hilgard). Los Altos, Calif. William Kaufman, Inc., 1975. *Divided Consciousness: Multiple Controls in Human Thought and Action*. New York: Wiley/Interscicence, 1977.

[17]Shor, "The Fundamental Problem in Hypnosis Research as Viewed from Historical Perspective," in Fromm and Shor, eds., *Hypnosis: Research Developments and Perspectives*, New York, Aldine-Atherton, 1972, at 38-39 (Emphasis in original).

impression. The existence of improved recall remains seriously in dispute. Barber,[18] reviewing the scientific basis of this assertion in 1966, could write,

> A series of experiments has ostensibly demonstrated that recall of remote memories or of previously learned material can be facilitated by first administering a hypnotic induction procedure and then administering either (a) motivational suggestions for heightened recall or (b) suggestions to regress to the time of original learning. If these findings are valid, hypnotic procedures which include motivational suggestions or regression suggestions should prove useful in various situations, such as in psychotherapy, in producing heightened recall of important life-history material. However, the findings cannot as yet be accepted as definitive; all pertinent experiments conducted up to this time are open to one or more serious methodological objections.[19]

One classic paper has presented experimental evidence

> That much of the complex phenomenon which we call hypnosis may result from (a) the subject's preconceptions of what hypnosis is, (b) implicit

[18]Theodore Xenophon Barber is a leading authority on hypnotism. His works include *Hypnosis: A Scientific Approach,* New York, Van Nostrand-Reinhold, 1969, *LSD, Marijuana, Yoga and Hypnosis,* Chicago, Aldine, 1970, *Hypnosis, Imagination and Human Potentialities, infra,* and numerous research articles on hypnosis, some of which are listed in Hilgard, "Hypnosis," 1975 Annual Review of Psychiatry 19-44, at 37.

[19]Barber and Calverley, "Effects on Recall of Hypnotic Induction, Motivational Suggestions, and Suggested Regression: a Methodological and Experimental Analysis," 71(3) Jour. Abnormal Psychology 169-180, at 169 (1966).

> cues by the hypnotist as to what he thinks it should be, and (c) the particular techniques of trance induction.[20]

The state of the art in hypnotism is perhaps best summarized by Erika Fromm:[21] "Unfortunately, the method is easy to learn. But hypnosis is like a scalpel: you wouldn't want it wielded by your janitor, only by your surgeon."[22]

Perhaps the clearest expression of the inherent problems created by allowing the admission of hypnotically-induced testimony was summarized by Dr. Martin T. Orne at App. Am. B.—App. p. 6:

> . . . There is no way by which a psychologist or psychiatrist, even with the most extensive experience in the field of hypnosis, can differentiate between an actual memory or a confabulation in a particular case without independent verification. Thus, there are many instances when subsequently verified accurate license numbers were recalled in hypnosis by individuals who previously could not remember them; by the same token, however, a good many license numbers which witnesses recalled turned out to belong to individuals where neither they nor their cars could have been implicated. *Unfortunately, a witness who is uncertain about his recall of a particular set*

[20]Orne, "The Nature of Hypnosis: Artifact and Essence," 58 Jour. Abnormal and Social Psychology 277-299, at 277 (1959).

[21]Professor at the University of Chicago and editor of *Hypnosis: Research Developments and Perspectives,* New York, Aldine-Atherton, 1972.

[22]Quoted in Hilgard, "Hypnosis is no Mirage," 8(b) Psychology Today 121-128, at 127 (November 1974).

of events can, with hypnosis, be helped to have absolute subjective conviction about what happened, though the certainty can as easily relate to a confabulation as to an actual memory. (Emphasis added).

Because Mr. Jensen has now been subjected to hypnotism, it is equally difficult to determine if a visual examination of petitioner (as opposed to his photograph) might have in fact cleared petitioner in the absence of the intervention of the hypnotism at the request of Deputy Gary Selk, "a personal friend and former coworker." The effective destruction of Jensen's independent recall through hypnotism raises substantial questions of due process which petitioner contends require full exploration by this Court.

II.

Hypnotism of a Witness as a Form of Mental Coercion Cannot Survive a Due Process Attack.

This Court has established that the manner of conducting police lineup or showup procedures may be so "unnecessarily suggestive and so conducive to irreparable mistaken identification as to constitute a violation of due process of law, and that this issue of due process is to be determined on the basis of the totality of the circumstances.[23]

Where the procedure followed is unnecessarily suggestive and conducive to irreparable mistaken identification, the accused is denied due process.[24]

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[23]*Validity under Federal Constitution of Police Lineup or Showup Procedures—Supreme Court Cases,* 34 L.Ed.2d 839, 845 (1974).

[24]*Palmer v. Peyton,* 359 F.2d 199 (C.A. 4th 1966).

In the present action the only eyewitness to link petitioner to the death vehicle could not identify petitioner as the purchaser of the vehicle when initially approached by the police (RTB 102:9-15). When the police decided to attempt to use hypnosis, a personal friend and former co-worker was assigned the responsibility of persuading him to submit (RTB 48:19-21, RTB 109:6-8, RT 18:16-19). The witness' friend, who was a police officer, explained that the police "were having an awful time tracing down this car" and that hypnosis would improve the witness' recall (RTB 109:11-12, 110:1-4). A detective was present during the hypnosis session (RTB 126:4-16) slipping suggestions to the hypnotist (RT 329:19-21, RTA 17:4-7, 18:24-27, 11:8-10).

Because the witness himself admitted that his identification of petitioner was "the product of hypnosis," (RT 304:16-17) the validity of that procedure, and the effect of witness' post-hypnotic identification of the intervening showing of a single photograph by the detective was critical.[25] It is equally clear that, in the absence of a procedure that is by definition suggestive and somewhat manipulative, there would have been no indictment, no trial and no conviction of petitioner. The sole reason for hypnosis was the inability of the police to tie the crime to petitioner. To borrow the words of this Court in *Foster v. California,* 394 U.S. 440, 443 (1969):

> This procedure so undermined the reliability of the eyewitness identification as to violate due process.

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[25]See, *e.g.,* page 10, *supra.* This raises distinct issues from those involving the single photo above.

As in *Foster, supra,* the procedure followed by the police in this case made it inevitable that petitioner would be identified, notwithstanding the factual inability of the principal witness to make an identification without hypnosis.

It has been held by this Court that due process cannot be deemed to be satisfied:

> . . . by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through deliberate deception of Court and jury. . . .[26]

The prospects of the use of hypnotism to produce the results desired by the State to obtain a conviction are frightening and threaten the very integrity of our criminal justice system.

III.

There Was an Insufficient Basis for Admitting the Hypnotically-Induced Testimony.

The prosecution's hypnotist admitted that, in his two previous experiences with hypnotic identification, he couldn't say whether the procedure actually improved recall (RTA 34:1-25), and he conceded that hypnosis "is not infallible" (RTA 37:21) and that identification after hypnosis might be mistaken (RTA 38:2-4).

Further, the tape of the hypnosis session, which was admitted into evidence, contained neither the beginning of the session (in which the hypnotist allegedly placed the witness in a trance) nor the end, in which the witness was allegedly brought out of the trance and asked to identify the petitioner through a photographic

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[26]*Mooney v. Holohan,* 294 U.S. 103, 112 (1935).

"lineup" (RTA 42-43). Consequently, there was no way for the defense experts to independently verify that the hypnotist or the police used proper techniques before and after the hypnotic session.

In summary, the evidence shows that the purported identification was the "product" of the hypnotic session which was not subject to defense scrutiny, that it followed a showing of a single photograph of the petitioner to the witness, that materials for a multi-photo showing were readily available at the time, that the detective who had previously contacted the witness concerning identification, was present prior to, during and after the hypnotic session, that the tape of the hypnotic session was incomplete, that the experts disagreed as to the overall reliability of hypnosis, as to the impact of the intervening single-photo showing and as to the effect of an officer's presence at the hypnotic session, and that the prosecutor's leading expert witness at the first trial, not called at the trial from which petitioner appeals, had serious reservations about the entire procedure.

There are three (3) theories on which the hypnotically-induced identification should have been excluded: that it was "impermissibly" suggestive (*Simmons v. U.S.,* 390 U.S. 377 [1968]), that it was "unnecessarily" suggestive (*Stovall v. Denno,* 388 U.S. 293 [1967], *Mason v. U.S.,* 414 F.2d 1176 [App.D.C. 1969], *United States v. Fowler,* 439 F.2d 133, 134 [9 Cir. 1971], *People v. Greene,* 34 Cal.App.3d 622, 644-645), and that it was not validated in accordance with *Frye v. U.S.,* 293 Fed. 1013 (D.C. Cir. 1923) and *People v. Kelly,* 17 Cal.3d 24 (1976)).

As stated in *People v. Kelly,* 17 Cal.3d 24, 30, 130 Cal.Rptr. 144 (1976):

> Admissibility of expert testimony based upon the application of a new scientific technique traditionally involves a two-step process: (1) The *reliability of the method* must be established, usually by expert testimony, and (2) the witness furnishing such testimony must be properly *qualified as an expert to give an opinion* on the subject. Additionally, the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case (Citations omitted. Emphasis in original).

Moreover,

> California courts, when faced with a novel method of proof, have required a preliminary showing of general acceptance of the new technique in the relevant scientific community (*Kelly, supra,* 17 Cal.3d at 30).

In adopting the majority approach of *Frye v. United States,* 293 Fed. 1013 (D.C. Cir. 1923), the California Supreme Court noted:

> Several reasons founded in logic and common sense support a posture of judicial caution in this area. Lay jurors tend to give considerable weight to "scientific" evidence when presented by "experts" with impressive credentials. We have acknowledged the existence of a ". . . misleading aura of certainty which often envelops a new scientific process obscuring its currently experimental nature." [As stated in *United States v. Addison,* 498 F.2d 741, 744 (App. D.C. 1974)] "scientific proof may in some instances assume a posture of mystic infallibility in the eyes of a jury . . ." (*Kelly, supra,* 17 Cal.3d at 32. Citations omitted).

While the scientific community is totally opposed to the use of hypnotism for the retrieval of historical facts because of the very nature of the procedure, the insufficiency of the foundation laid by the prosecution gave an even greater basis for exclusion.

IV.

Failure of Trial Counsel to Adequately Object to the Use of Hypnotically-Induced Evidence Denied to Petitioner the Right to Effective Assistance of Counsel.

It is settled that a criminal defendant is entitled under the Sixth Amendment to the United States Constitution and under Article I, Section 15 of the California Constitution to the effective assistance of counsel. As this Court said in *People v. Ibarra,* 60 Cal.2d 460, 464, 34 Cal.Rptr. 863 (1963):

> It is counsel's duty to investigate carefully all defenses of fact and of law that may be available to the defendant, and if his failure to do so results in withdrawing a crucial defense from the case, the defendant has not had the assistance to which he is entitled (60 Cal.2d at 464, 34 Cal.Rptr. at 866).

If it can be shown that "the omissions of trial counsel involved a critical issue, and that such omissions cannot be explained on the basis of knowledgeable choice of tactics," *People v. Anderson,* 43 Cal.App.3d 94, 101, 117 Cal.Rptr. 507 (3d Dis. 1974), or that counsel's failings deprived the defendant of a crucial defense, *In Re Williams,* 1 Cal.3d 213, 81 Cal.Rptr. 784

(1969), then the petitioner was denied effective assistance of counsel.

Contrary to the assertion of the Court of Appeal that the error of counsel was not prejudicial, it was in all probability fatal to petitioner's case. It should be remembered that Jensen was the only identification witness. It is questionable whether as a matter of law the case could even have gone to the jury without his testimony. And it is highly questionable whether, if the *Frye-Kelly* issue had been timely raised, the People could have met their burden to admit Jensen's testimony, the hypnotist, or the tape of the hypnotic interrogation.

Petitioner's attorney at trial was also his attorney on appeal. Counsel on appeal raised the issue, apparently for the first time, of whether a proper foundation was laid at trial for admissibility of hypnosis evidence. Moreover, petitioner's attorney below failed to request as part of the record in this case either the transcripts of prior trials or the content of written motions, despite the fact that such a request is required by Rule 33 of the California Rules of Court, objections in the third trial were only incorporated by reference from the first two, and the legal issues on Jensen's identification of the petitioner were submitted on the briefs at the first trial.

Because of the above, the record before the Court of Appeal was totally inadequate. In particular, given incorporation by reference of objections not in the record, the Court of Appeal could not safely conclude, as it did, that the foundation issue had not been raised below. Moreover, because as the Court of Appeal noted, "[O]n appeal appellate counsel, who also represented appellant in trial, do not raise the issue of

Ibarra error," the petitioner was not represented on appeal as to the issue of ineffective assistance of counsel *at trial.*

In California, a right to effective assistance of counsel on appeal has been recognized. *In Re Smith,* 3 Cal.3d 192, 90 Cal.Rptr. 1 (1970). *Smith* held that:

> [T]he inexcusable failure of petitioner's appellate counsel to raise crucial assignments of error, which arguably might have resulted in reversal, deprived petitioner of the effective assistance of appellate counsel to which he was entitled under the Constitution. 3 Cal.3d at 202, 203.

In California, "Petitioner need not establish that he was entitled to reversal in order to show prejudice in the denial of counsel." 3 Cal.3d at 202. The standard is only one of an *arguable* ground for reversal.

Examples of ineffectiveness of counsel on appeal abound in this record. Most glaring are attorney Westwick's failure to request a record including all objections preserved from the first two trials in the third, a failure which made complete appellate review impossible. Another example is failure to preserve issues by requesting a rehearing as to factual matters in the Court of Appeal. That failing places the petitioner's newly retained counsel in the unenviable position of disagreeing strenuously with the Court of Appeal's interpretation of the record but being faced with the consequences.

Given all of the above, it was abuse of discretion for the Court of Appeal to refuse petitioner's new Counsel's request to vacate the decision and grant a rehearing or in the alternative to conditionally grant a rehearing to permit a showing of ineffectiveness of appellate counsel to be made.

Because, as the Court of Appeal noted, appellate counsel who were also defense counsel did not raise the issue of ineffectiveness of counsel at trial, the Court is asked to recognize in such cases the existence of a debilitating conflict of interest. California courts have stated, "An attorney owes the highest duty of fidelity to his clients." *Schullman v. State Bar,* 16 Cal.3d 631, 636, 128 Cal.Rptr. 671 (1976). An attorney must give his clients his undivided loyalty, and must not allow a conflict of interest without "full consent and full disclosure." *Ishmael v. Millington,* 241 Cal.App.2d 520, 50 Cal.Rptr. 592, 596 (3d Dis. 1966).[27]

At the trial level, it is recognized that conflict of interest constitutes a denial of effective assistance of counsel unless the record affirmatively shows knowing and intelligent waiver of the right to counsel free from that conflict. *People v. Thompson,* 13 Cal.App. 3d 47, 54, 91 Cal.Rptr. 341, 344-345 (2d Dis. 1970), *People v. Chacon,* 69 Cal.2d 765, 73 Cal.Rptr. 10, 16 (1968). Because this Court has adopted a standard of effective assistance of counsel on appeal almost exactly the same as that at trial, *Smith, supra,* it follows that where there are arguable issues of denial of effective assistance of trial counsel, appellate counsel who was also defense counsel has a debilitating conflict of interest and the appellant is entitled to a new appeal if the record does not reveal knowing and intelligent waiver.

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[27]See also *People v. Robinson,* 42 Cal.2d 741, 269 P.2d 6 (1954).

V.

This Court Is Not Bound by the Lower Court's Factual Determination Relating to the Denial of Due Process.

The unpublished decision of the Court of Appeal relies heavily on what it alleges to be an implied finding of the reliability of hypnotically-induced testimony.[28] Based upon such "implied finding", the Court of Appeal concluded it was bound on the issues before it and refused to consider petitioner's due process argument.[29]

Whatever may or may not have been the constraints placed upon the appellate courts of the State of California in reviewing the trial court's determination of this issue, this Court has, as set forth in *Napue v. Illinois,* 360 U.S. 264, 271 (1959) recognized its duty:

> . . . to make its own examination of the record when federal Constitutional deprivations are alleged.

In reaching such a position, the Court in *Napue v. Illinois, supra,* 360 U.S. 272 relied upon the earlier decision in *Niemotko v. Maryland,* 340 U.S. 268, 271 (1951) where it was held:

> In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded.

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[28]See C.A. App. pp. 5-6.

[29]See C.A. App. p. 6.

In view of the fact that the sole testimony submitted by the prosecution to support a contention of lack of suggestibility was scientifically inaccurate, this court has an obligation based upon a long course of judicial precedent to reject the conclusions reached by the California Courts which have taken from petitioner his right to freedom without due process of law.

VI.

A Hypnotically-Induced Identification Cannot Support a Conviction Where Other Relevant Evidence Is in Conflict.

As set forth in greater detail above, the prosecution witnesses in this case admitted having shown the star witness, Jensen, a single photo of the defendant one week prior to his purported identification. The officer admitted that it would have been easy to obtain multiple similar photographs from the Sheriff's files for a photographic "lineup." It cannot be disputed, and was not, that the procedure was *unnecessarily* suggestive. Nonetheless, the trial court and the Court of Appeal both refused even to exercise discretion to make a factual finding on the latter issue (RTB 133-136, decision of the Court of Appeal at 5-6).

In *Stovall v. Denno*, 388 U.S. 293 at 302 (1967), the United States Supreme Court held that a pretrial confrontation would deny due process if it was "unnecessarily suggestive and conducive to irreparable mistaken identification." The *Stovall* test was applied in *People v. Caruso*, 68 Cal.2d 183, 65 Cal.Rptr. 336, 339 (1968), which is still good law. In *Simmons v. U.S.*, 390 U.S. 377, 384, 19 L.Ed.2d 1247, 88 S.Ct. 967 (1968), the Supreme Court, reviewing a photographic identification which took place prior to

Stovall, held that photographic identifications would be set aside if "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification," noting that this seemingly new standard "accords with our resolution of a similar issue in *Stovall v. Denno*." 390 U.S. 384.

This Court has recently expressed its reluctance to adopt a per se rule in the determination of the admissibility of evidence obtained under circumstances where the evidence may have been subject to some suggestibility if the totality of the circumstances surrounding such identification indicate the probability that the identification is valid.[30] In reaching its decision, the Court relied heavily upon the earlier analysis of Associate Justice Stevens in *United States ex rel. Kirby v. Sturges*, 510 F.2d 397 (1975) who observed at 510 F.2d 402:

> In *Stovall* the Supreme Court held that whether the confrontation conducted in a particular case is so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law . . . depends on the totality of the circumstances surrounding . . .

The Court in *Manson v. Brathwaite, supra*, did not however, totally dismiss its concern for the admissibility of potentially unreliable evidence as indicated by the Court's statements at ..... U.S. ....., 53 L.Ed.2d 152, where the observation is made:

> . . . the driving force behind *United States v. Wade*, 388 U.S. 218, 18 L.Ed.2d 1149, 87 S.Ct. 1926 (1967) and *Gilbert v. California*, 388 U.S.

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[30] *Manson v. Brathwaite*, ... U.S. ....., 53 L.Ed.2d 140, 97 S.Ct. ....., (June 16, 1977).

263, 18 L.Ed.2d 1178, 87 S.Ct. 1951 (1967) [right to counsel at a post-indictment line-up] and *Stovall,* all decided on the same day, was the Court's concern with the problems of eye-witness identification. Usually the witness must testify about an encounter with a total stranger under circumstances of emergency or emotional stress. *The witness' recollection of the stranger can be distorted easily by circumstances or by later actions of the police. Thus Wade and its companion cases* reflect the concern that the jury *not hear eyewitness testimony unless that evidence has aspects of reliability.* (Emphasis added).

The record in the present case, by contrast with both *Manson v. Brathwaite, supra,* and *United States ex rel. Kirby v. Sturges, supra,* is clear that there is simply no way to judicially (or factually, for that matter) determine the reliability of the hypnotically-induced identification which led to petitioner's conviction.

Dr. William S. Kroger, a prosecution expert on hypnosis who testified at the first trial in this case, testified that, "Intervening events can interfere with the validity or with the actual recall; specific recall" (RT 101:10-11) in hypnotic age regression. Certain segments of his testimony are worth quoting at length:

Q. You used the term "undue influence." It's true; isn't it, Doctor, that while hypnosis is capable of breaking down barriers, it is also subject to suggestion?

A. I don't know of anything that is not subject to suggestion.

Q. Neither do I, and that would include hypnosis; wouldn't it?

A. That's right. There is no hypnosis; there is only suggestion.

Q. And memory recall is also subject to the possibility of confabulation, isn't it?

A. That is correct.

Q. And confabulation is generally the construction of events that did not occur; isn't it; very generally?

A. Did not, or they think they occurred.

Q. They think they occurred. As an example, I might be hypnotized and asked who sat beside me on either side of me in my fifth grade class, and I might say, Susie on my left; Johnny on my right; while under hypnosis, and yet the fact that I said that Susie and Johnny sat in those respective seats would not prove that that was necessarily the fact; would it?

A. Not unless they were validated.

Q. In other words, the hypnotist would have to independently validate that Susie and Johnny did sit in those respective seats; wouldn't he?

A. That's correct.

Q. And that is because of the possibility of confabulation; namely, the ability of a person to think they saw something and they did not?

A. I don't think the term "confabulation" is quite correct, Counsel. I think probably a more apt term would be "misremember."

Q. Misremember. All right. I know what that means, too.

THE COURT: The other one, I assume you had to look up.

MR. WESTWICK: No, your Honor, I stole it from a psychiatrist who looked it up, as your Honor well knows.

Q. All right. A person may, under hypnosis, misremember circumstances or facts.

A. Always possible.

Q. All right. Isn't it also possible that persons may misremember in hypnosis because of a self-conscious desire to please the hypnotist, or some other person?

A. Yes, that's possible.

Q. If a person in a given hypnotic situation is somehow led to believe that the hypnotist wants a certain answer, or hopes for a certain answer, the element of suggestion may in fact precipitate that answer; might it not?

A. On the basis of minimal cues, it could.

Q. In other words, it would take some very adroit questioning to avoid such suggestion?

A. Well, it wouldn't necessarily have to be adroit.

Q. It would have to be more than minimal questioning; is that fair?

A. That's right.

Q. I take it that there have been any number of experiments conducted concerning information that was produced by a hypnotic recall; hasn't there?

A. Yes, there has.

Q. And in short, those experiments have indicated that the information that one may produce

through the technique of hypnotic recall in some instances that we've seen, it may be inaccurate; isn't that true?

A. That's correct.

* * *

Q. Well, let's go back to September 11th.

A. Okay.

Q. And suppose that, again, he's been shown this picture. And that when he comes in for hypnosis, he knows that he is again being asked if he can identify the person who sold the car, or to whom he sold the car. And again, he's, on September 11th, been shown a picture of an individual under circumstances when he knew that the individual might be thought by the police to be the person to whom he sold the car.

The hypnotist cannot remove that element of suggestion that has already been—

A. Imprinted. That is correct.

Q. He cannot remove it. (RT1 110-113, RT1 123-124).

Even Dr. Gott, the hypnotist, admitted that, in his two previous experiences with hypnotic identification, he couldn't say whether the procedure actually improved recall (RTA 34:1-25), and he conceded that hypnosis "is not infallible" (RTA 37:21) and that identification after hypnosis might be mist[illegible] (RTA 38:2-4).

Finally, it should be noted that the tape of the hypnosis session, which was admitted into evi[illegible]e, contained neither the beginning of the session (in [illegible]h Dr. Gott allegedly placed the witness in a trance) nor the end, in which Jensen was allegedly brought

out of the trance and asked to identify the petitioner through a photographic "lineup." (RTA 42-43). Consequently, there was no way for the defense experts independently to verify that Dr. Gott or the police used proper techniques before and after the hypnotic session.

When viewed against the weight of both scientific and legal authority in the field, the present case clearly raises questions of the most frightening magnitude when one realizes that petitioner herein is presently serving a life sentence as a result of an investigation device employed by the representatives of the state which is inherently unreliable.[31]

Viewing the totality of the admissibility of evidence resulting from the use of mind control devices in criminal cases, at least one standard text observes:

> This combination of truth and other matters may offer leads for further investigation, or material for psychiatric diagnosis and treatment, all of which may produce admissible evidence. But the statement made during the interview, when offered . . . in a criminal case, have been uniformly rejected on the basis of the hearsay rule, lack of scientific acceptance of the underlying premise, or absence of necessary scientific foundation.[32]

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[31]The Court's attention is specifically directed to the volume of authority set forth in McCormick's HANDBOOK OF THE LAW OF EVIDENCE 507-510, *Statements Made While Under The Influence of Drugs or Hypnosis*, §208 (2d Ed. 1972). The volume of evidence questioning the reliability should then be weighed against the apparent increased interest in hypnosis evidenced by the article by Martin Reisner in the November 1976 edition of Police Chief Magazine.

[32]McCormick, *supra*, at p. 509, *Cf., People v. Harper*, 111 Ill.App.2d 204, 250 N.E.2d 5 (1969) where suppression of evidence upheld.

Prior reported California decisions had consistently held testimony which was the product of hypnosis inadmissible. As early as *People v. Ebanks*, 117 Cal. 652, 49 Pac. 1049 (1897), the California Supreme Court ruled that expert testimony as a defendant's statements under hypnosis were inadmissible, holding that the trial court was right emphatically to declare that "The law of the United States does not recognize hypnotism." 117 Cal. at 665-666. In *People v. Busch*, 56 Cal.2d 868, 16 Cal.Rptr. 898 (1961), California again upheld suppression of hypnotism testimony.

In *People v. Modesto*, 59 Cal.2d 722, 31 Cal.Rptr. 225 (1963) the Court expressed concern over hypnotic interrogation which might be *improperly* considered as independent proof of the facts recited therein. 59 Cal.2d at 732-733 (emphasis added).

Thus, California had never before upheld the admissibility of hypnotically-induced evidence to prove the truth of the statements of an individual influenced by it. Cases in other jurisdictions are in accord. In *State v. Pusch*, 46 N.W.2d 508, 522 (N.D. 1950), despite a careful foundational offer of proof, expert testimony purporting to establish a defendant's innocence through the use of hypnosis was held inadmissible because "No case has been cited by either party relating to the admissibility of the evidence proffered and no case has been found. We think that the evidence was clearly inadmissible . . ." And recently, in *State v. Pierce*, 207 S.E.2d 414, 418 (S.C. 1974), the South Carolina Supreme Court held:

> It is the general rule that testimony as to the results of hypnotic examination is not admissible if offered for the truth of the matter asserted. [Citations] We have found no cases in which

> a court has upheld the admission or which has found it error to have excluded testimony of the results of hypnotic examination offered to prove the guilt or innocence of the accused.

While the Court of Appeal did cite several cases in which hypnotically-induced testimony was admitted, in none of these cases did the Courts allow the testimony without some verification of the facts being testified to.[33] In *Wyller* and *Jorgensen, supra,* Note 33, the courts explicitly withheld judgment as to the admissibility of statements made under hypnosis to prove the truth of the matter stated (*Wyller,* 503 F.2d at 510, *Jorgensen,* 492 P.2d at 315) that was an issue in the present case.

While in *Harding v. State,* 5 Md.App. 230, 246 A.2d 302 (1968) the prosecution was allowed to have the victim's memory enhanced, the Court did so with the recognition that:

> some authorities warn that fancy can be mingled with fact in some cases (246 A.2d 312).

Further, in *Harding, supra,* the Court also found:

> . . . (3) there was sufficient corroboration of the witness' testimony: . . . (c) the accused was seen . . . immediately prior to the time the crime was committed. In addition, a precautionary instruction was given. (246 A.2d 312).

By contrast, the only person who claimed to have seen petitioner anywhere near the death vehicle was Jensen, who admitted his inability to make an identification in the absence of hypnosis (RTB 102:9-15, RTB 125:8-21, RT 257:21-24, RT 304:10-18) and this transaction itself was some three and one-half months prior to the commission of the crime in question.

[33] *Wyller v. Fairchild Hiller Corp.,* 503 F.2d 506, 509-510 (9 Cir. 1974), *State v. Jorgensen,* 492 P.2d 312, 315 (Ore. App. 1971) and *Harding v. State,* 246 A.2d 302, 306-312.

Conclusion.

Petitioner has been convicted of a major crime and sentenced to life imprisonment based upon the identification of a witness who was incapable of identifying petitioner before the intervention of a Police hypnotist. Such a conviction represents the gravest threat to our criminal justice system which, if allowed to stand, will allow the regular manipulation of witnesses' minds in the future. Due process requires a reversal.

Respectfully submitted,

LAW OFFICES OF JEROME ZAMOS,
By JEROME ZAMOS,
Attorney for Petitioner.

APPENDIX A.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

The People of the State of California, Plaintiff and Respondent, v. John Philip Quaglino, Defendant and Appellant. 2d Crim. No. 29766, Sup. Ct. No. 109524.

Filed: Sept. 30, 1977.

APPEAL from a judgment of the Superior Court of Santa Barbara County. Robert L. Trapp, Judge. Affirmed.

Westwick & Collison, R. James Westwick, Brian H. Burke and Robert J. Graham for Defendant and Appellant.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney General, Norman H. Sokolow and Roy C. Preminger, Deputy Attorneys General for Plaintiff and Respondent.

Defendant John Philip Quaglino appeals from his conviction on a jury verdict of first degree murder. (Pen. Code, §§ 187, 189.) The appeal lies. (Pen. Code, § 1237, subd. (1).)

Appellant contends that: (1) the single person photographic showup was unduly suggestive; (2) the prosecution failed to properly qualify hypnosis as a reliable scientific technique for improving recollection; (3) evidence of prior acts of appellant should not have been admitted by the trial court; (4) certain declarations of the victim should have been excluded as hearsay; (5) the method by which the jury venire was produced did not meet the statutory requirements; and (6) appel-

lant was denied due process when the trial court refused to dismiss the charges after two hung juries.[1] After examination of these contentions, we have determined for the reasons set forth below that they lack merit.

FACTS[2]

At approximately 6:30 a.m. on the morning of September 10, 1975, Dyanne Quaglino, the estranged wife of appellant,[3] was struck by a car and killed as she was jogging. The car did not stop and there were no automobile skid marks in the area where her body was found, which was unusual for this type of accident. Based on the descriptions of a witness who had seen the car drive up the street but who had not seen the accident, the police located the car, a 1959 green and white Ford, that evening behind the apartment complex where appellant lived. Tire tracks and glass found at the scene of the accident matched up with this car. Additionally, fibers from Dyanne's clothing were found on the car's exterior.

In May 1975, Myron Jensen, who worked at a Chevrolet dealership, sold the car for a friend to a Richard W. Bellmore. Jensen kept the car at his house

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[1]At oral argument appellant advanced for the first time a claim of error in the trial court having used CALJIC 2.62 in instructing the jury. We could refuse to consider this claim because of its tardiness. (See *People v. Superior Court On Tai Ho,* 11 Cal.3d 59, 68.) We have, however, considered it and reject it on the merits as a proper evidentiary basis existed for the instruction. (See *People v. Karsnok* (Sept. 12, 1977, 2 Crim. No. 29333, ... Cal.App.3d .....)

[2]We state the facts in the light most favorable to the People as the prevailing party below. (*People v. Vann,* 12 Cal.3d 220, 225.)

[3]Dyanne had filed for divorce approximately five months before her death.

and did not sell the car through the dealership. After agreeing to buy the car and arranging to pick it up later, the purchaser drove away in a 1970 brown Chevrolet station wagon.[4] Several days later the purchaser came to Jensen's place of employment and told him that the battery did not work. Jensen replaced the battery for him and gave him the smog certificates for the car.

The Santa Barbara County Sheriff's Department contacted Jensen on September 11 and asked him to describe the purchaser of the car. The deputies then showed him a 12 year old picture of appellant and asked him if he looked familiar. Jensen stated that the picture "struck a bell," but could not identify it. The following weekend the deputies showed Jensen seven pictures of bearded men, none of whom he could identify as the purchaser.[5]

The following week, the deputies and Dr. Frank Gott, a Santa Barbara psychiatrist, contacted Jensen about undergoing hypnosis to improve his memory of the person who had purchased the car. Jensen agreed and Dr. Gott hypnotized him. After Jensen came out of hypnosis, he was given a stack of seven photographs. He picked out appellant's picture as the man to whom he sold the car. At a lineup at the county jail a few days later, Jensen again identified appellant.

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[4]The defense introduced evidence that appellant did not own nor have access to a car matching this description.

[5]These pictures included the picture of Richard A. Bellmore, an out-of-state resident who was then a suspect in the case. Bellmore happened to be the last name of a male clubmate of appellant at business school.

A handwriting expert testified at the trial that it was highly probable that the person who had written "Richard W. Bellmore" on the transfer document was appellant. Since appellant refused to give a handwriting exemplar of the specific words, the expert could not give a more positive opinion.

A fingerprint expert testified that numerous prints were removed from the car and he formed the opinion that one of the fingerprints was appellant's. Two defense fingerprint experts, however, testified that although there were similarities between the prints, they could not positively identify the fingerprints as those of appellant.

The prosecution also produced evidence that Dyanne and appellant were separated, were involved in divorce proceedings, and had had disagreements over the property settlement and child custody. Several witnesses also testified that on several occasions, appellant had threatened to hurt Dyanne. One witness testified that appellant told him that Dyanne was an unfit mother and he was going to get the children back one way or another. Appellant also told one of Dyanne's friends that he was sorry he beat her.

Appellant testified in his own behalf. He denied that he had killed his wife. He stated that he was in bed with his girl friend, Sonia Gowda, on the morning of Dyanne's death. He got up to jog around 6:00 a.m. on the morning of Dyanne's death and returned approximately 20 minutes later.[6] At 7:15 a.m. the

[6]Sonia Gowda's testimony was read into evidence by the prosecution and the defense introduced her picture. She testified that appellant went out jogging the morning of his wife's death, but had not been breathing heavy when he returned. When first questioned by law enforcement officers, however, she stated that appellant had not left the apartment.

sheriff's office called and told appellant to come over to the house of one of Dyanne's neighbors. He was then told that Dyanne had been killed by a hit-and-run accident. Appellant stated that he had never purchased nor seen the 1959 Ford which caused Dyanne's death.

DISCUSSION

1. *The Identification by Jensen*

Appellant first contends that the single person photographic showup used by the deputies was unnecessary and unduly suggestive and therefore the post-hypnosis identification was tainted. As previously noted, Myron Jensen was shown a single photograph of appellant and he stated that it "struck a bell." Approximately a week later he underwent hypnosis and when he came out of the hypnosis he picked out appellant's picture.[7]

The United States Supreme Court and California courts have held that a pretrial photographic identification will be set aside on due process grounds when, in considering all the circumstances, "the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. . . ." (*Simmons v. United States* (1968) 390 U.S. 377, 384 [19 L.Ed.2d 1247]; *People v. Hicks*, 4 Cal.3d 757, 764; *People v. Pijal*, 33 Cal.App.3d 682, 689.) The trial court followed this standard in determining that the photographic identification procedure was not prejudicial. It impliedly found that the fact that Jensen saw appellant's photo-

[7]The picture which Jensen was first shown was taken approximately 12 years before the picture he identified after hypnosis.

graph in a one-man photographic showup prior to undergoing hypnosis did not give rise to a substantial likelihood of irreparable misidentification when after hypnosis Jensen identified appellant's photograph from a group of seven. If there is substantial evidence to support this finding, it is binding on appeal. (*People v. Greene*, 34 Cal.App.3d 622, 646; *People v. Guerin*, 22 Cal.App.3d 775, 779.)

At the hearing on the admissibility of this identification, three psychiatrists testified—one for the prosecution and two for the defense. Dr. Gott, the prosecution's expert who had also hypnotized Jensen, testified that the fact that Mr. Jensen had been shown the photograph would not affect his post-hypnosis identification because during the hypnosis session his mind was focused solely on the events surrounding the sale of the car. A later occurrence, such as the showing of this photograph, was not in his mind at the time of the sale of the car and thus would not affect his recall. The defense psychiatrists, Dr. Patterson and Dr. Wells, neither of whom had nearly as much experience with or confidence in hypnosis as Dr. Gott, did not agree with Dr. Gott and both indicated that the fact that Jensen had seen a previous picture of appellant might have influenced his choice after the hypnosis.

Dr. Gott's testimony, however, constitutes substantial evidence to support the trial court's finding. We are thus bound by it. Therefore, the single photographic showup did not taint Jensen's subsequent identification of appellant.

Appellant additionally contends that the prosecution did not establish that hypnosis has been accepted by the scientific community as a reliable technique

for enhancing recollection for identification of a suspect. (See *People v. Kelly*, 17 Cal.3d 24, 30; *People v. Law*, 40 Cal.App.3d 69, 85.) Appellant, however, did not raise this issue below. The prosecution thus never presented evidence on the reliability of hypnosis in general.[8]

Although a defendant may not raise an issue on appeal which he failed to assert below (see *People v. Welch*, 8 Cal.3d 106, 114-115; *People v. Boothe*, 65 Cal.App.3d 685, 690), we recognize that a defendant may claim that such error deprived him of a crucial defense and reduced his trial to a farce or a sham. (*People v. Ibarra*, 60 Cal.2d 460, 464.[9]) The burden is on the defendant, though, to establish his counsel's ineffectiveness. Moreover, proof of the ineffectiveness must be a demonstrable reality and not a speculative matter. (*People v. Martinez*, 14 Cal.3d 533, 538.)

From the record in the instant case we have determined that this error did not reduce the trial to a farce or a sham. All three psychiatrists, including the two defense psychiatrists, agreed that hypnosis was a valid and reliable technique for improving recollection. Thus, the prosecution's failure to establish the reliability of hypnosis in general was not prejudicial.

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[8]Testimony of a witness concerning a matter on which his memory has been enhanced by hypnosis is admissible in other jurisdictions. (*Wyller v. Fairchild Hiller Corporation* (9th Cir. 1974) 503 F.2d 506, 509-510; *State v. Jorgensen* (Ore. App. 1971) 492 P.2d 312, 315; *Harding v. State* (Md.App. 1968) 246 A.2d 302, 306-312.) These courts have held that its credibility and weight are for the jury to determine.

[9]We note that on appeal appellate counsel, who also represented appellant at trial, do not raise the issue of *Ibarra* error.

The only issue on which the psychiatrists disagreed was whether the single photographic showup tainted the identification after the hypnosis.

2. *The Admission of Evidence of Prior Acts*

At the trial, two prosecution witnesses testified that appellant had threatened Dyanne with violence, had struck her, and threatened to "take care" of a friend of Dyanne who had helped her. The trial court instructed the jury that this evidence was received and could be considered only for the limited purpose of determining the identity of the perpetrator, a motive for the crime, and the existence of intent. (See CALJIC 2.50.) Appellant contends that the evidence should not have been admitted for any of these purposes.

Evidence Code section 1101, subdivision (b), provides that evidence that a person committed an act is admissible "when relevant to prove some fact [such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident] other than his disposition to commit such acts." We have determined that while the evidence was admissible to prove motive and identity, it was not admissible to show intent. This error, however, was not prejudicial.

Appellant contends that the evidence was not relevant to show the identity of the perpetrator because there were no common and distinguishing marks between the acts of violence and the hit-and-run murder of Dyanne. (See, e.g., *People v. Archerd*, 3 Cal.3d 615, 638-639.) Evidence of a defendant's prior threats and acts of violence against the victim of a crime of violence, however, is admissible to establish the identity of the defendant as the perpetrator since the prior threats against the victim indicate a pattern of conduct

by the defendant which logically tends to identify him as the perpetrator of the crime of violence against the victim. (*People v. Daniels*, 16 Cal.App.3d 36, 45-46; *People v. Small*, 7 Cal.App.3d 347, 355; cf. *People v. Hiser*, 267 Cal.App.2d 47, 63.) Thus, the evidence was admissible in this case since the prior threats of violence were directed at Dyanne, the murder victim in this case.

Appellant also contends that the evidence was inadmissible to prove motive and that even if it was admissible, the evidence was cumulative. Although motive is not an element of the prosecution's case, evidence of motive is relevant to show the identity of a person who commits the crime. Evidence of threats and violence by the defendant against the victim of a violent offense is admissible to show the defendant's motive. (*People v. Daniels, supra*, 16 Cal.App.3d at p. 46; *People v. Argentos*, 156 Cal. 720, 726.) Thus, the evidence in the present case was admissible to prove appellant's motive which was relevant to show the perpetrator's identity, an issue in this case.

Appellant also asserts that this evidence was cumulative to other evidence which showed appellant's feelings toward the victim and his concern about her living with another man. The evidence in question, however, was far more probative since it demonstrated that his feelings about their relationship, the divorce and child custody were more than the normal marital disillusionment and dissatisfaction.[10]

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[10]Appellant also asserts that the trial court should have excluded this evidence since its probative value was outweighed by its prejudicial effect. (Evid. Code, § 352.) Although the evidence was prejudicial since it indicated appellant was guilty, the evidence was very probative as previously noted.

Appellant also asserts that this evidence should not have been admitted to prove his intent. In *People v. Guerrero*, 16 Cal.3d 719, the California Supreme Court stated that evidence of prior crimes or acts may be used to prove intent "in cases where the proof of defendant's intent is ambiguous, *as when he admits the acts* and denies the necessary intent because of mistake or accident." (*Id.* at p. 726; *People v. Kelley*, 66 Cal.2d 232, 242-243.) The court noted that this type of evidence is normally admitted when there is no doubt that the defendant committed an act, but some question as to his intent in doing so. (*Ibid.; People v. Shader*, 71 Cal.2d 761, 776-777.) In the present case, the principal issue which the jury had to decide was the identity of the perpetrator of the offense. Once the identity of the perpetrator was determined, then the intent was established by the circumstances of the crime. Thus, since in the present case there was doubt as to whether appellant had committed the act, and he did not deny the necessary intent, this evidence should not have been admitted for this purpose.

This error, however, was not prejudicial. The evidence was properly received for the other two purposes. Even though it was admitted to prove intent, intent was established by other evidence in this case. Moreover, the challenged evidence was not strong probative evidence on appellant's intent at the time the crime was committed. That was essentially established by the circumstances of the crime.

3. *Evidence of Dyanne's Statements*

A prosecution witness, Wilma Michener, testified that in early 1974, appellant and Dyanne stayed at her Mammoth Lake's resort. Dyanne burst into the

Michener house crying and shaking and said appellant was trying to kill her with a knife. Dolores Melvin, another prosecution witness, testified that in December 1974, Dyanne came over to her house crying and shaking and stated, "My God, Dee, he's going to kill me." Appellant contends that these statements made by Dyanne were inadmissible and should have been excluded as hearsay. We do not agree.

Evidence Code section 1240 provides that: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." The theory underlying this exception is that the declarant's lack of opportunity for reflection and deliberate fabrication assures that the statement is trustworthy. (*Box v. California Date Growers Assn.*, 57 Cal.App.3d 266, 272.) If the statements were made under circumstances of nervous shock or excitement, they are admissible.[11] (*People v. Gonzales*, 269 Cal.App.2d 586, 591-592.)

In the present case, the statements were clearly made under shock and nervous excitement. In both cases, Dyanne came over to the witnesses' homes crying and shaking from the occurrences. This is sufficient evidence to establish that she was still in shock from the events. Her statements were thus admissible as spontaneous declarations.

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[11]Contrary to appellant's contention, there is no requirement that there be some evidence independent of the spontaneous statement itself of the occurrence of the event which caused the statement to be made. (*People v. Worthington*, 38 Cal.App. 3d 359, 366-367; *People v. Butler*, 249 Cal.App.2d 799, 804-805; Jefferson, California Evidence Benchbook, § 13.1, p. 161.)

Appellant further contends that the prejudicial effect of these statements outweighed their probative value and that their admission was cumulative. (See Evid. Code, § 352.) The trial court, however, did not abuse its discretion in admitting these statements since they were not cumulative and were probative of appellant's motive to kill Dyanne and such probative value outweighed the prejudice to appellant. (See *People v. Cooley*, 211 Cal.App.2d 173, 202, overruled on other grounds, *People v. Lew*, 68 Cal.2d 774, 778.)

4. *The Jury Venire*

Appellant contends that the jury venire was improperly produced by the clerk's office and that this error was compounded by the trial court's liberal excuse of potential jurors.[12] At the hearing on the motion for new trial, appellant produced evidence on the Santa Barbara County Jury Commissioner's policy. Under this policy some of the potential jurors are summoned to court by a letter sent through the mail. A second group is placed on "alert lists." If during a trial the first panel is exhausted deputy clerks phone individuals on the alert lists. The clerks all believed that they had the power to excuse jurors on their request. There are no written rules and regulations governing possible excuses. Appellant asserts that this procedure deprived him of a fair and impartial trial.

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[12]Respondent asserts that appellant is precluded from challenging the validity of these procedures because he did not object before the jury was sworn. (See *People v. Sirhan*, 7 Cal.3d 710, 751; *People v. Flowers*, 38 Cal.App.3d 813, 818; Pen. Code, § 1060.) Although appellant's counsel filed a declaration at the hearing on the motion for new trial stating that he was not aware of the procedures until after the completion of the trial, he could have learned of the procedures before the trial began. We have decided, however, to reach the merits of this issue.

Section 201 of the Code of Civil Procedure provides that: "In any county or city and county the judge of the superior court or a majority of the judges thereof may adopt *written* rules and regulations supplementary to such rules as may be adopted by the Judicial Council establishing a procedure whereby the jury commissioner of said county or city and county may be empowered to grant excuses from jury service to such prospective jurors who in the opinion of the jury commissioner qualify for excuses under Section 200." (Emphasis added.) Additionally, section 4.5 of the Standards of Judicial Administration recommended by the Judicial Council provides that:

"(a) Each court should adopt a policy governing the granting of excuses from jury service on grounds of undue hardship pursuant to Section 200 of the Code of Civil Procedure. The policy should incorporate the following principles:

"(1) No class or category of persons should be automatically excluded from jury duty except as provided in Sections 198 and 199 of the Code of Civil Procedure.

"(2) A person should be excused from jury service for undue hardship only if it is not possible to defer the person's jury service to a time within one year when no undue hardship would result.

"(3) Inconvenience is not an adequate reason for excuse from jury duty, although it may in the court's discretion be considered a ground for a temporary deferment of the obligation to serve.

"(b) For the guidance of judges and court or county officials charged with the duty of selecting lists of persons to serve as trial jurors, the policy adopted

pursuant to subdivision (a) should specifically provide that upon *written request* an excuse on the ground of undue hardship may be granted for any of the following reasons:

"(1) Excessive travel distance or lack of available transportation to the court.

"(2) Extreme financial burden, or undue risk of material injury to or destruction of the juror's property or property entrusted to the juror, where it is not feasible to make alternative arrangements to alleviate the financial burden or risk.

"(3) Physical or mental incapacity to serve as a juror, or disability that would entail undue risk of harm to the person's physical or mental health. The court may in any individual case require that the person furnish a letter from a physician specifying the nature and extent of the incapacity or disability, its probable duration, and the particular reasons why the person cannot or should not serve as a juror.

"(4) The prospective juror's services are immediately needed for the protection of the public health and safety, and it is not feasible to make alternative arrangements to relieve the person of these responsibilities during the period of service as a juror.

"(5) The prospective juror has a personal obligation to provide actual and necessary care to another, and it is not feasible to make alternative arrangements for that care. The court may in any individual case require that the person furnish a letter from a physician stating that the person being cared for is in need of regular and personal care.

"(6) Prior grand or trial jury service or a summons for jury service in any state or federal court during the immediately preceding 12 months." (Emphasis added.)

Appellant asserts that the "alert" system is defective because a clerk, without written standards, is making a judicial decision to excuse a juror for hardship and the excuse is not verified either in court or by an affidavit. (See Code Civ. Proc., § 246.)

Although it appears that the deputy clerks were not given written standards to follow in granting excuses to people on the alert lists, appellant has not established that he was prejudiced by this fact. The clerks did not randomly excuse people but only granted excuses if individuals had a prearranged vacation or business trip, personal illness or illness of an immediate family member, had a doctor's appointment, or worked in a one-person business. The defendant has the burden of establishing that this policy is an intentional, systematic discrimination against the persons of a certain class, economic status, or geographical location. (*People v. Gibbs,* 12 Cal.App.3d 526, 539.) In the present case, he has failed to meet that burden. Even though there appears to be errors and irregularities in failing to comply strictly with the statutory framework in making up the list, the list is not invalidated if there is no prejudice to the parties involved. (*People v. Langdon,* 54 Cal.App.3d 384, 391.)

5. *Failure to Dismiss the Charges*

Appellant contends that the trial court should have dismissed the charges pursuant to Penal Code section

1385[13] after two previous juries hung. Appellant asserts that he was denied due process because at the third trial the prosecution presented more polished evidence and because Sonia Gowda, a prosecution witness and his girl friend at the time of the murder, did not appear as a witness.

We note that the third trial of appellant did not violate double joepardy principles since jeopardy does not attach when a jury is discharged for failure to reach a verdict. (*People v. Wheeler*, 23 Cal.App.3d 290, 311.) Moreover, appellant was not subjected to cruel and unusual punishment by a third trial. (*People v. Terry*, 70 Cal.2d 410, 417-418.)

Appellant asserts that at the third trial, the prosecution presented a stronger case. This claim, however, is mere speculation. The defense might have also presented a stronger case after two previous trials.

The effect of Sonia Gowda's failure to testify at the third trial also is pure speculation. The prosecution wanted Ms. Gowda to testify at the third trial, but she refused to leave her residence in Canada to appear for a third time. Her testimony from the second trial was read into evidence by the prosecution and her picture was introduced by the defense. Thus, appellant was not denied due process because he was tried for a third time after two hung juries.

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[13]Penal Code section 1385 reads:

> "The court may, either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading."

In the present case, appellant made a motion in the trial court pursuant to this section.

DISPOSITION

The judgment is affirmed.

Cobey, *Acting P. J.*

We concur:

Allport, *J.*

Potter, *J.*

APPENDIX B.

Clerk's Office, Supreme Court, 4250 State Building.
San Francisco, California 94102

Dec. 15, 1977.

I have this day filed Order Hearing Denied.

In re: 2 Crim. No. 29766. People v. Quaglino.

Respectfully,

G. E. BISHEL
Clerk